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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 617

GRACE HARTLEY EMERY, ROBERT W. EMERY, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court's opinion on its decision overruling petitioners' motion to dismiss (R. 14-17) is reported at 85 F. Supp. 354. The opinion of the Court of Appeals (R. 52-58) is reported at 186 F. 2d 900.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1951 (R. 59) and the petition for writ of certiorari was filed on March 17, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below was required to pass on the constitutionality or retroactivity of Section 205 of the Housing and Rent Act of 1947, as amended in 1949 by Section 204, Public Law 31, 81st Cong.

2. Whether the court below was required to hold that the tenants who paid rental overcharges to petitioners were indispensable parties to the action.

3. Whether the attorneys for the Housing Expediter were authorized to institute and prosecute this action.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664; 50 U.S.C. App. 901 et seq. (hereinafter referred to as the Price Control Act), and of the Housing and Rent Act of 1947, 61 Stat. 193, as amended, 62 Stat. 37 (ch. 77), 93, Pub. Laws 31 and 574, 81st Cong.; 50 U.S.C. App. (Supps. II and III) 1881 et seq. (hereafter referred to as the Housing and Rent Act), are set forth in Appendix A, *infra,* pp. 13-15.

STATEMENT

Petitioners are owners of housing accommodations in Los Angeles, California within the Los Angeles Defense-Rental Area (R. 3) and as such were, at the times here involved, subject to the Price Control Act and Housing and Rent Act of

1947 as well as the rent regulations issued thereunder. Alleging that petitioners had charged their tenants more than the maximum rentals established for their housing accommodations during the period between January 7, 1945 and June 30, 1949, respondent brought this action on June 9, 1949 pursuant to Section 205(a) of the Price Control Act for restitution, and pursuant to Sections 205 and 206 of the Housing and Rent Act for statutory damages, injunctive relief, and restitution of rental overcharges (R. 2-6). To this complaint, petitioners filed a motion to dismiss which was denied (R. 13, *United States* v. *Emery,* 85 F. Supp. 354). Petitioners' answer to the complaint did not deny any of the allegations charging violation (R. 22-24). It merely set forth eight separate defenses (R. 23) which, to the extent pertinent, will be discussed hereafter. Respondent waived its request for injunction (R. 34) and the matter was submitted to the district court on a motion for judgment on the pleadings (R. 24-26). After a hearing, the district court granted respondent's motion and entered a judgment for respondent in the sum of $1002.50 as restitution to be disbursed by respondent to certain tenants named in the judgment (R. 34-37). Upon appeal, petitioners urged, consistent with the defenses asserted in their answer (R. 22-23), that Section 205 of the Housing and Rent Act as amended in 1949 by Section 204, Public Law 31, 81st Congress) *infra,* pp. 14-15 was uncon-

stitutional, and that if valid, could not be applied retroactively; that the four tenants who were overcharged were indispensable parties plaintiff; and that the attorneys appointed by the Housing Expediter lacked authority to institute and maintain this action on behalf of the Government. Rejecting all of the petitioners' contentions as untenable, the court below rendered an opinion affirming the judgment of the district court (R. 52-58).

ARGUMENT

1. Petitioners assert that Section 205 of the Housing and Rent Act which, as amended in 1949, *infra*, pp. 14-15, confers upon the United States the right to sue for statutory damages in the event the overcharged tenant fails to sue for such damages within thirty days, is unconstitutional, and they contend that the court below should have passed upon the validity of that section in this case, as well as upon its retroactive effect. Plainly, there was no occasion for the court below to pass upon the validity or scope of Section 205.

Although the Government's complaint asserted a claim for statutory damages under Section 205, that claim was not allowed by the district court, and the only relief granted by that court was an order of restitution (R. 34-37), which was given under the authority of Section 205(a) of the Price Control Act, *infra*, pp. 13-14, and Section 206(b) of the Housing and Rent Act, *infra*, p. 15. See

Porter v. *Warner Holding Co.*, 328 U. S. 395, 400.[1] Consequently, petitioners' contention is without merit. Since the district court's judgment did not involve Section 205 of the Housing and Rent Act, either before or after the 1949 amendment, there was no reason or authority for the court below to pass on the validity of that Section, or to determine whether or not it is retroactive in its effect. All that was before the court below was the judgment of the district court. *Loudon* v. *Taxing District*, 104 U. S. 771, 774; *Cudmore* v. *Bowles*, 145 F. 2d 697, 698 (C. A. D. C.), certiorari denied, 324 U.S. 841; *Hagen* v. *Porter*, 156 F. 2d 362, 366 (C. A. 9), certiorari denied, 329 U. S. 729. In view of the fact that the judgment of the district court did not include a claim granted under Section 205 of the Housing and Rent Act, the court below was fully warranted in disregarding the contentions of petitioners with respect to that Section.

2. There is likewise no merit in petitioners' contention that the tenants concerned were indispensable parties to the action. Petitioners assert that for a violation occurring on or prior to April 1, 1949 only the tenant could sue, and that "the United States had no right until thirty days had expired after the law giving it the purported right to sue was passed" (Brief p. 15).

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[1] The language of Section 206(b) of the Housing and Rent Act, *infra*, p. 15, is practically identical with that of Section 205 (a) of the Price Control Act, *infra*, pp. 13-14.

Petitioners presumably again have in mind Section 205 of the Housing and Rent Act, as amended in 1949, which provides that the United States shall have the right to sue for statutory damages in the event the tenant fails to sue within thirty days from the date of the violation. Cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 401, construing the identical provisions contained in Section 205(e) of the Price Control Act, 50 U.S.C. App. 925(e). Since no relief was granted by the trial court under Section 205 of the Housing and Rent Act, this ground of petitioners' argument is irrelevant.

So far as the claim for restitution pursuant to Section 205(a) of the Price Control Act and Section 206(b) of the Housing and Rent Act is concerned, the tenants are clearly not indispensable parties. In asserting restitution claims on behalf of the tenant, the United States acts in the public interest. *Porter* v. *Warner Holding Co., supra.* The tenant's rights are merely incidental. *Creedon* v. *Randolph,* 165 F. 2d 918-919 (C.A. 5); *Ebeling* v. *Woods,* 175 F. 2d 242, 245 (C. A. 8); *Bowles* v. *Skaggs,* 151 F. 2d 817, 821 (C. A. 6).

It is true, of course, that in an action for restitution of overcharges under either Section 205 (a) of the Price Control Act, *infra,* pp. 13-14, or Section 206(b) of the Housing and Rent Act of 1947, *infra,* p. 15, the trial court may, in the exercise of its equity powers, make tenants parties to the action so that conflicting claims between them and the

landlord as to counterclaims or offsets may be determined at one time. *Porter* v. *Warner Holding Company, supra,* at 403. See also Rules 19 and 20, F.R.C.P. Here, however, petitioners made no showing that there were conflicting claims between them and their tenants, or that they had any counter demands against them. Instead, they argued merely that the tenants were indispensable parties. They made no effort to have the tenants made parties to the suit and gave no factual reasons why they would be prejudiced if the tenants were not brought in. Accordingly, the court below was clearly right in overruling their contention. Cf. *Co-Efficient Foundation* v. *Woods,* 171 F. 2d 691 (C. A. 5); *McCoy* v. *Woods,* 177 F. 2d 355, 356 (C. A. 4).

3. Equally lacking in merit is petitioners' final contention that the attorneys appointed by the Housing Expediter had no authority to prosecute this suit on behalf of the Government. Such authority existed both under the Price Control Act and the Housing and Rent Act.

(a) The attorneys for the Price Administrator and his successors, the Temporary Controls Administrator and the Housing Expediter, were each in turn expressly authorized to institute and prosecute civil actions under Section 205 of the Price Control Act (50 U.S.C. App. 925) for statutory damages, injunctions, and restitution. Section 201(a) of the Price Control Act (50 U.S.C. App.

921) provided in part that "Attorneys appointed under this section may appear for and represent the Administrator in any case in any court." See *Case* v. *Bowles,* 327 U. S. 92, 96-97.

The Price Administrator administered the Price Control Act until December 12, 1946, at which time the functions of the Office of Price Administration including the right to bring suit were transferred to the Office of Temporary Controls (Executive Order 9809, 11 F.R. 14281). See *Fleming* v. *Mohawk Co.,* 331 U. S. 111. The Office of Temporary Controls then carried out enforcement activities under the Price Control Act until June 1, 1947, at which time Executive Order 9841, which had been issued on April 23, 1947 (12 F.R. 2645), terminated the Office of Temporary Controls as of June 1, 1947, and transferred all functions relating to rent control to the Office of the Housing Expediter effective May 4, 1947, together with authority to institute and maintain actions under the Price Control Act. Since the expiration of the Price Control Act on June 30, 1947, the Housing Expediter, acting under the authority of that Act, (Sec. 1(b), 50 U.S.C. App. 901(b)) and through his attorneys, has continued to bring and prosecute suits for both statutory damages and restitution arising out of violations of rent regulations which had occurred during the life of the Act. See *United States* v. *Moore,* No. 344, this Term, decided March 26, 1951, footnote 6. Cf. *Woods* v. *Hills,* 334 U. S. 210. Thus, with respect to the claims

for restitution arising under the Price Control Act, there was express statutory authority for the attorneys for the Housing Expediter to institute and prosecute this suit.

(b) There was also statutory authority, supplemented by authorized delegation, for the attorneys appointed by the Housing Expediter to prosecute this action for the Government pursuant to Section 206(b) of the Housing and Rent Act with respect to restitution matters arising under that Act.

When this action was commenced on June 9, 1949, the 1949 amendment to the Housing and Rent Act had already been in effect since April 1, 1949. Section 206(b) of that Act, *infra,* p. 15, confers authority upon the court in a suit brought by the United States to grant injunctive relief or to issue an "other order" such as one directing restitution.[2] *United States* v. *Moore, supra.* Section 206(e) of the Act, *infra,* p. 15, provides in part that "attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act."

Pursuant to Section 206(e), the Attorney Gen-

[2] Prior to the 1949 amendment Section 206(b) conferred upon the Housing Expediter authority to sue for injunctive relief or other order such as an order for restitution in his own name. After the amendment in 1949, suits brought for injunction, etc., under Section 206(b) were required to be brought in the name of the United States. The 1949 amendment also provided that suits for statutory damages under Section 205 should be brought in the name of the United States.

eral on March 31, 1949, delegated to attorneys appointed by the Housing Expediter authority to "appear for and represent the United States in any cases designated by you arising under Sections 205 and 206 of the Housing and Rent Act of 1947, as amended." See Attorney General's letter of March 31, 1949, addressed to the Housing Expediter, *infra*, p. 16). This order of delegation was in effect when the instant suit was commenced on June 9, 1949 (R. 6). Subsequently, on September 24, 1949, the delegation of authority from the Attorney General was reaffirmed by an order of delegation signed by the Acting Attorney General which conferred upon attorneys appointed by the Housing Expediter the right to represent the United States in any case arising under Sections 205 and 206 of the Housing and Rent Act of 1947, *infra*, p. 17. See 14 F. R. 6097. This was plainly a ratification of the action taken by the attorneys for the Housing Expediter in bringing this suit, even without the letter of March 31, 1949 signed by the Attorney General. In any event, it was an authorization to prosecute the pending suit to a conclusion. Thus, contrary to petitioners' contention, the attorneys appointed by the Housing Expediter have, at all times since the 1949 amendment of the Housing and Rent Act, had authority from the Attorney General to prosecute civil suits for the United States, as permitted by the provisions of Section 206(e) of the Housing and Rent Act, *infra*, p. 15.

In view of the provisions of Section 206(e) and the Attorney General's delegation of authority thereunder, petitioners' reliance upon 28 U. S. C. 507, which provides generally that United States Attorneys shall prosecute all civil suits in behalf of the United States, is misplaced.[3] 28 U. S. C. 507 is a codification, *inter alia,* of R. S. 771 (28 U. S. C. (1946 ed.) 485), which was considered by this Court in *Case* v. *Bowles,* 327 U. S. 92. Since, as this Court held in *Case* v. *Bowles, supra,* R. S. 771 did not prescribe the procedure for bringing civil suits under the Price Control Act, neither does the substantially similar language now contained in 28 U. S. C. 507 prescribe the procedure to be followed in bringing suits under the Housing and Rent Act, after the Attorney General has exercised his delegation power under Section 206(e) and has authorized the attorneys appointed by the Housing Expediter to prosecute such suits. In view of the fact that Section 206(e) authorizes the Attorney General to delegate to attorneys appointed by the Housing Expediter authority to "appear for and represent the United States in any case arising under this Act," and in view of the further fact that the Attorney General has granted the Housing Expediter's attorneys that authority, there can be no doubt that they were duly empowered to institute and prosecute the instant action in the name

[3] Petitioners also cite 28 U. S. C. 503, but that section merely provides that the Attorney General may appoint attorneys to assist United States Attorneys when the public interest so requires.

of the United States[4] with respect to the claims for restitution arising under the Housing and Rent Act, as amended. Accordingly, the court below committed no error in holding that the attorneys for the Housing Expediter had ample authority to institute and prosecute this case.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
JOHN R. BENNEY,
Attorney.

ED DUPREE,
General Counsel,
LEON J. LIBEU,
Assistant General Counsel,
NATHAN SIEGEL,
WILLIAM A. MORAN,
Special Litigation Attorneys,
Office of the Housing Expediter.

APRIL 1951.

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[4] Petitioners infer (Br. 15-16) that there is a distinction between a suit for restitution brought in the name of the Housing Expediter and one brought in the name of the United States. However, "Regardless of captions, the issues in these cases could not change and the real party in interest plaintiff has always been the same." *United States* v. *Allied Oil Corp.*, No. 364, this Term, decided April 9, 1951, slip opinion, p. 4.

APPENDIX A

1. Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664, 50 U. S. C. App., Secs. 901 et seq.)

SECTION 1 (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the Administrator''.). * * * Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. * * *

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to

the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

2. Housing and Rent Act of 1947, 61 Stat. 193, as amended, 62 Stat. 37 (ch. 77), 93, Pub. Laws 31 and 574, 81st Cong.; 50 U. S. C. App. (Supps. II and III) 1881 *et seq.*

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided,* That if the person from whom

such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. * * *

206 (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

206 (e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

APPENDIX B

Office of the Attorney General
Washington, D. C.
March 31, 1949

Honorable Tighe E. Woods
Housing Expediter
Office of Housing Expediter
Washington 25, D. C.

My dear Mr. Woods:

Section 205 of the Housing and Rent Act of 1949, which becomes effective on April 1, 1949, amends Section 206 of the Housing and Rent Act of 1947, as amended, among other things to provide that "attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act." I shall appreciate receiving at an early date your recommendations concerning the action that I should take pursuant to this provision. In the meantime, the attorneys appointed by you are authorized to appear for and represent the United States in any cases designated by you arising under Sections 205 and 206 of the Housing and Rent Act of 1947, as amended.

Sincerely,

TOM C. CLARK,
Attorney General.

Office of Housing Expediter

Organization Description Including Delegations of Final Authority

14 F. R. 6097

Delegation of Authority to Attorneys

Pursuant to the authority vested in me by section 205, Public Law 31, 81st Congress, attorneys appointed by the Housing Expediter are hereby authorized to appear for and represent the United States in any case arising under sections 205 or 206 of the Housing and Rent Act of 1947, as amended, and for that purpose to institute, conduct or maintain all civil actions, suits or proceedings, before or after judgment, arising under said sections of said act, and to defend the United States, the Housing Expediter or any officer or employee thereof, in any case arising under said act: *Provided, however,* That the foregoing authority shall not apply to any proceedings before the Supreme Court of the United States.

Dated: September 24, 1949.

Peyton Ford,
Acting Attorney General.

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